

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 4, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP192-CR

Cir. Ct. No. 2013CF1244

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMAL THAMES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 PER CURIAM. Jamal Thames appeals from an amended judgment convicting him of false imprisonment with domestic abuse and repeater enhancers and ordering restitution and from an order denying his postconviction motion

challenging his sentence and restitution order. He argues that his near-maximum sentence is unduly harsh and resulted from the trial court's improper focus on stale and "confused" facts and that the ordered restitution is excessive, as some of it stems from a preexisting condition of the victim unrelated to the instant offense. We disagree and affirm.

¶2 Thames and his girlfriend, IM, got into a row. Thames grabbed her by the hair, hit and slapped her in the face, threatened to kill her, choked her until she could not breathe or talk, and pinned her to the floor with his knee on her throat. Police found IM with both eyes swollen, blackened, and with petechiae; with swelling, redness, and scratches on her neck; and complaining of pain in her abdomen, chest, sides, and left shoulder. IM was assessed in the hospital emergency department and, based on her complaints and presentation, underwent CT scans of her facial bones, abdomen, and pelvis. In addition to contusions from the fracas with Thames, the scans revealed multiple dental abscesses.

¶3 Thames was charged with strangulation and suffocation, false imprisonment, battery, and disorderly conduct, all with domestic abuse and repeater enhancers. He pled guilty to false imprisonment, which, with the repeater enhancer, exposed him to a ten-year prison sentence. IM accrued \$7,825.46 in medical bills for ambulance transport and the single day of hospital assessment and treatment. The bulk of the charges were for the diagnostic CT scans.

¶4 At sentencing, the court observed that, after a "disturbing" criminal history dating back to 1989 that included armed burglary, first-degree sexual assault, and recklessly endangering safety, Thames was "back for another crime of personal violence." The court also noted that, twenty-five years ago, Thames "had two women pregnant at the same time," terming it a "serial harem," and had child

support arrearages in excess of \$40,000. Concluding it would be “grossly irresponsible” to “deal with this other than very sternly with an eye toward the protection of the community,” the court imposed six years of confinement and three years of extended supervision. Thames appeals.

¶5 Thames first contends his sentence is unduly harsh. He argues that the court discounted his remorse and gave short shrift to the facts of the instant case, and instead improperly focused on the old incident of his fathering children with two different mothers and also confused the facts of two 1990 convictions.

¶6 Sentencing is a matter for the discretion of the trial court. *State v. Stuhr*, 92 Wis. 2d 46, 49, 284 N.W.2d 459 (Ct. App. 1979). We will not set aside the court’s discretionary determination if it “applied the proper legal standards to the facts before it, and through a process of reasoning, reached a result which a reasonable judge could reach,” *State v. Grindemann*, 2002 WI App 106, ¶30, 255 Wis. 2d 632, 648 N.W.2d 507. A presumption exists that a sentence within the statutory limits is not unduly harsh. *See id.*, ¶32. When a defendant argues the sentence is unduly harsh or excessive, an erroneous exercise of discretion will be found “only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.” *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The defendant carries the burden of showing an unreasonable or unjustifiable basis for the sentence. *Elias v. State*, 93 Wis. 2d 278, 281-82, 286 N.W.2d 559 (1980).

¶7 The sentencing court must consider three primary factors—the gravity of the offense, the character of the offender, and the need to protect the public, *State v. Harris*, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984), and

may consider a variety of other relevant factors, including the defendant's past record of criminal offenses, history of undesirable behavior patterns, and his or her personality, character and social traits, *see State v. Jones*, 151 Wis. 2d 488, 495-96, 444 N.W.2d 760 (Ct. App. 1989). The weight to be given the factors is within the trial court's wide discretion. *State v. Curbello-Rodriguez*, 119 Wis. 2d 414, 434, 351 N.W.2d 758 (Ct. App. 1984).

¶8 Thames' complaint about the trial court's comment about his decades-old "serial harem" shows he grasps neither the court's point nor that fathering a child goes beyond a merely historical fact. Thames has eight children by four different women. The PSI suggests he has little, if any, contact with them and only "believes" they reside in one state or another. We read the court's comment not as pointing out a decades-old transgression but as a proper recognition of Thames' continued abdication of his responsibility to support and parent the children he helped bring into the world.

¶9 Thames also argues that the court "confused" the facts of two 1990 convictions. The court commented that Thames was caught after an armed burglary and first-degree sexual assault with an eight-inch butcher knife "because the police trailed you with your own trail of blood right to your apartment after you sexually assaulted this 15-year-old girl." Thames interrupted to say that the blood trail was "not from that incident." The court then corrected itself and cited a separate case where Thames stabbed two women ten to fifteen times each and police found him by following a trail of his blood to his apartment. Thames did not dispute the truth of either event.

¶10 We are at a loss as to why it matters which incident involved the trail of blood, and Thames sheds no light in that regard. The court's point was that

Thames consistently has “been a problem for society” and needs incarceration to “get [him] on track to understand the wrongfulness and indecency” of his behavior. A defendant’s history of criminal offenses and a failure to correct his or her behavior are proper sentencing considerations. *See State v. Alexander*, 2015 WI 6, ¶¶32-33, 360 Wis. 2d 292, 858 N.W.2d 662.

¶11 The trial court considered the primary factors, implicitly concluded that any mitigating factors did not outweigh the gravity of Thames’ offense, and deemed the need to protect the public to be the overriding concern. It explained:

[Y]ou’re living for yourself. You’re living for your own pleasure. You’re living for your own happiness. And it appears that what society demands of you, what the natural law demands of you, what common decency demands of you[,] these are things that don’t seem to be important to you.

And what about—what is the future for all these people—people who get stabbed ... the children who have not a father, who is just carousing and getting himself involved in violent episodes? This is very dangerous. You know, you need to make such massive changes because you’re a dangerous, violent criminal, and for me to approach this case looking at you in any other way would be a gross miscarriage of justice.

¶12 The sentence imposed is within the boundaries the legislature has deemed appropriate. It is not so excessive and unusual and so disproportionate to the offense Thames committed as to shock public sentiment, nor does it otherwise constitute an erroneous exercise of discretion.

¶13 Thames next contends restitution should not have been ordered for services related to IM’s preexisting dental condition and that the restitution decision was not based on a logical interpretation of the facts concerning his

ability to pay restitution. He seeks to have the \$7,825.46 amount reduced by approximately \$5000.

¶14 “Before restitution can be ordered, a causal nexus must be established between the ‘crime considered at sentencing,’ WIS. STAT. § 973.20(2) [2013-14]¹, and the disputed damage.” *State v. Canady*, 2000 WI App 87, ¶9, 234 Wis. 2d 261, 610 N.W.2d 147. “In proving causation, a victim must show that the defendant’s criminal activity was a ‘substantial factor’ in causing damage. The defendant’s actions must be the ‘precipitating cause of the injury’ and the harm must have resulted from ‘the natural consequence[s] of the actions.’” *Id.* (citation omitted; alteration in original). “[A] causal link for restitution purposes is established when ‘the defendant’s criminal act set into motion events that resulted in the damage or injury.’” *State v. Longmire*, 2004 WI App 90, ¶13, 272 Wis. 2d 759, 681 N.W.2d 534 (citation omitted). The victim must prove the claim by a preponderance of the evidence. *See* WIS. STAT. § 973.20(14)(a). The restitution statute is to be “broadly and liberally” construed to allow victims to recover their losses due to a defendant’s criminal conduct. *State v. Anderson*, 215 Wis. 2d 673, 682, 573 N.W.2d 872 (Ct. App. 1997).

¶15 Determinations of restitution are left to the sound discretion of the trial court, *Canady*, 234 Wis. 2d 261, ¶6, here, a circuit court commissioner. “We may reverse a discretionary decision only if the ... court applied the wrong legal standard or did not ground its decision on a logical interpretation of the facts.” *Id.* Should the trial court not fully set forth or explain its reasoning, we independently

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless noted.

review the record to determine if it provides a basis for the court's exercise of discretion. *State v. Pharr*, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983).

¶16 The crime victim compensation fund reimbursed providers \$7825.46 for IM's treatment, including CT scans of her facial bones, abdomen, and pelvis to diagnose her injuries after the pummeling she sustained at Thames' hands. The court ordered Thames to pay restitution in the amount the fund paid out. That the CT scans by happenstance revealed dental abscesses in the course of assessing her injuries does not alter the fact that the examinations were performed because of Thames' criminal conduct. A defendant "cannot escape responsibility for restitution simply because his or her conduct did not directly cause the damage." *State v. Madlock*, 230 Wis. 2d 324, 336, 602 N.W.2d 104 (Ct. App. 1999).

¶17 When considering whether to order restitution and the amount thereof, the court "shall consider" the defendant's present and future earning ability. WIS. STAT. § 973.20(13)(a)3. Thames testified that he is able to work, has held jobs "here and there when I can find 'em," held a job in a prison kitchen for over five years, holds a high school equivalency diploma, and will be just fifty years old on release from prison. While the court was not moved by Thames' lament that his criminal history makes finding work difficult, it also noted that his future earning ability is unknowable at this point and he could come into unexpected money. A defendant's ability to pay "should not be restricted to the offender's financial condition only at the moment of sentencing." *State v. Dugan*, 193 Wis. 2d 610, 625, 534 N.W.2d 897 (Ct. App. 1995).

¶18 There was no showing that Thames will not be able to earn minimal wages while incarcerated or will not have the means to acquire employment when he is released on extended supervision. We agree with the court that state

taxpayers who paid for the victim's care "should be put in line ... to at least get a shot at getting repaid." Further, Thames may seek sentence modification in the future if he is unable to meet his restitution obligation. *Id.* at 624-25. If modification is not warranted, however, the remaining amount is enforceable as civil judgment against him. WIS. STAT. § 973.20(1r).

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

